Supreme Court, U.S.
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No. 94-2134

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

GEORGE PETERSON,

Petitioner,

V.

AMERICAN LIFE & HEALTH INSURANCE COMPANY, CREATIVE HEALTH PROGRAMS; PACIFIC SOUTHWEST ASSOCIATION OF SMALL EMPLOYER FIRMS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the exclusion for bypass surgery in an insurance policy which funds a welfare benefit plan for partners and employees of a business exclude coverage for petitioner's coronary bypass surgery?

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF AUTHORITIES. iii

I. EXCEPTIONS TO QUESTIONS PRESENTED AND STATEMENT OF THE CASE 1

II. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

III. REASONS FOR DENYING THE PETITION. 5

A. The Ultimate Disposition of the Case Would not be Altered if Mr. PETERSON were Allowed to Assert Claims Under State Law 5

B. Petitioner Exaggerates the Nature of the Split in Jurisdiction. 6

IV. CONCLUSION. 8

TABLE OF AUTHORITIES

PAGE

CASES

Fugarino v. Hartford Life and Accident Insurance Co. 966 F.2d 178 (6th Cir. 1992), *cert. denied*, 113 S.Ct. 105, 112 L.Ed.2d 774 (1993). 6,7

Meredith v. Time Insurance Co. 980 F.2d 352 (5th Cir. 1993). . 8

National Mutual Insurance Co. v. Darden 503 U.S. 818, 112 S.CT. 1344, 117 L.Ed.2d 581 (1992). 7

Turnbow v. Pacific Mutual Life Insurance Company 765 P.2d 1160 (Nev. 1988) . . . 7

STATUTES & REGULATIONS

California Insurance Code
§ 01291.5(b)(7). 5

29 C.F.R. § 2510.3-3. 3

29 C.F.R. § 2510.3-3(a)&(b) 3

39 C.F.R. § 2510.3-3(c)(2). 3

Internal Revenue Code of 1954
§ 736. 4

RULES

U.S. Supreme Court Rule 10 6

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I.

EXCEPTIONS TO QUESTION PRESENTED AND STATEMENT OF THE CASE

Petitioner's Question Presented and Statement of the Case mischaracterizes the factual background. Quivira Marine Service Center was a partnership of which the petitioner was a partner. Quivira Marine Service Center provided health insurance to its partners and employees and further performed administrative duties with respect to maintenance of the insurance coverage. In May of 1989, an

interim policy of insurance was purchased for the partners and employees of the Quivira Marine Service Center because of termination of previous insurance. Thereafter, Quivira Marine Service Center moved coverage for Norman Schultz, an employee, and Walter Gutjar, a partner, to coverage under Blue Cross. The petitioner remained on the AMERICAN policy because he failed a Blue Cross physical. During all times that the petitioner was covered by the AMERICAN LIFE & HEALTH INSURANCE policy, at least one employee of Quivira Marine Service Center was receiving health insurance coverage paid for by Quivira Marine Service Center as the benefit of his employment.

In Petitioner's Question Presented and Statement of the Case, he confuses the formation and maintenance of an ERISA plan with the purchase of an individual policy of insurance. By providing insurance, through whatever policy, Quivira Marine Service Center established an ERISA plan. The mere fact that the petitioner was on a different policy of insurance than Quivira Marine Service Center's employee did not alter the creation, formation, or maintenance of a welfare benefit plan under the applicable provisions of ERISA. More importantly, at all times pertinent hereto, Quivira Marine Service Center provided benefits of insurance to at least one of its employees in addition to petitioner.

II.
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner cites to 29 C.F.R. §2510.3-3(c)(2) seeming to imply that a partner in a business with employees cannot fall under the umbrella of ERISA. First, the statute quoted by the petitioner merely says that a partner shall not be deemed an employee with respect to the partnership. The Ninth Circuit ruling in this case does not address whether or not Mr. PETERSON is considered an "employee" of Quivira Marine Service Center. The opinion merely held that, pursuant to previous decisions of the Ninth Circuit, Mr. PETERSON was a "beneficiary" of an ERISA plan. Therefore, the citation made by petitioner is irrelevant.

Furthermore, the quotation cited by petitioner is taken out of context. The previous paragraph, 29 C.F.R. §2510.3-3 clarifies the definition of "employee benefit plan" and who will be covered under such a plan. 29 C.F.R. §2510.3-3(a) & (b), the two paragraphs directly preceding the section relied upon by petitioner states as follows:

> "(a) General. This section clarifies the definition in section 3(3) of the term "employee benefit plan" for purposes of title I of the Act and this chapter. It states a general principle which can be applied to a large class of plans to determine whether they constitute employee benefit

> plans within the meaning of section 3(3) of the Act. Under section 4(a) of the Act, only employee benefit plans within the meaning of section 3(3) are subject to title I.
>
> . . . .
>
> (b) Plans without employees. For purposes of title I of the Act and this chapter, the term "employee benefit plan" shall not include any plan, fund or program, other than an apprenticeship or other training program, under which no employees are participants covered under the plan, as defined in paragraph (d) of this section. For example, a so-called "Keogh" or "H.R. 10" plan under which only partners or only a sole proprietor are participants covered under the plan will not be covered under title I. <u>However, a Keogh plan under which one or more common law employees, in addition to the self-employed individuals, are participants covered under the plan, will be covered under title I</u> [emphasis added]. Similarly, partnership buyout agreements described in section 736 of the Internal Revenue Code of 1954 will not be subject to title I."

The regulation read in its entirety, indeed, supports the previous ruling of the Ninth Circuit on this matter.

III.
REASONS FOR DENYING THE PETITION

A. The Ultimate Disposition of the Case Would not be Altered if Mr. PETERSON were Allowed to Assert Claims Under State Law.

The petitioner, in requesting certiorari, seeks to challenge the ruling by the Ninth Circuit that ERISA pre-empted his claims under state law. However, as was extensively addressed by the Ninth Circuit in their opinion on this case, the outcome for the petitioner would not be any different under state law. As part of petitioner's argument to the Ninth Circuit, he claimed that even though ERISA might grant jurisdiction to the Federal Court, he was still entitled to relief under the "savings clause", which incorporates into ERISA state statutes which "regulate insurance." Petitioner sought to change his group disability insurance policy into an individual policy based on California Insurance Code regulations. The policy was specifically approved as a group policy by the California Insurance Commissioner and the Ninth Circuit explored this argument with petitioner and found it to be meritless.

> "However, we do not believe that, in enacting §01291.5(b)(7), the California legislature intended to permit an insured to reform the nature of his policy and obtain benefits for which he never bargained by engaging courts to second guess the Commissioner's

> approval of a policy as providing 'group' insurance. Regardless of whether the Insurance Commissioner should have approved the policy, an otherwise valid policy is a binding contract and governs the obligations of the party until the Commissioner revokes his approval". (Opinion of the Ninth Circuit, Pages 11-12).

The Ninth Circuit went on to find that the AMERICAN policy was neither vague nor ambiguous and was enforceable according to the tenor of its terms. This interpretation was appropriate since, in essence, this is a claim for payment of medical expenses for bypass surgery from an insurance contract which excludes bypass surgery as one of the covered benefits.

As this court is well aware, there is more to consider in deciding whether or not to grant certiorari than a mere split in the Circuits. There should be "special and important reasons" for the granting of petitioner's writ, Supreme Court Rule 10.

Because Mr. PETERSON's claim would not be decided any differently under state law, the decision as to whether or not ERISA pre-empts his claim is moot.

B. Petitioner Exaggerates the Nature of the Split in Jurisdictions.

Although respondent concedes the opinion in Fugarino v. Hartford Life & Accident Insurance Co., 966 F.2d 178 (6th

Cir. 1992, Cert. Denied 113 S. Ct. 105, 112, L. Ed. 774 (1993), directly conflicts with the Ninth Circuit's holding in this case, many of the other cases relied upon by the petitioner are not in direct conflict with the Ninth Circuit's ruling. Most especially, in Turnbow v. Pacific Mutual Life Insurance Comapany 765 P.2d 1160 (Nev. 1988), the Nevada Supreme Court decided that there was insufficient evidence of an ERISA plan established by the employer. Since the court did not find an ERISA plan, its opinion with respect to who qualifies as a proper ERISA plaintiff is moot and by definition dictum.

> "We conclude that the District Court erred in finding that the appellant had created an ERISA plan. Appellant did not create an ERISA plan. Unless there is some indication that an employer is committed to or has guaranteed the continuation of such benefits, nothing is created for ERISA to protect and no plan exists." Turnbow supra. at 1161.

In National Mutual Insurance Co. v Darden 503 U.S. 818, 112 S. Ct. 1344, 117 L. Ed.2d 581 (1992), an insurance company's former agent brought an ERISA action to recover alleged retirement benefits. The issue in that case was whether a salesperson who was hired as an independent contractor was an employee within the definition of ERISA. The issue in Darden has no bearing on whether a owner of a business can also be a beneficiary of an ERISA plan.

In Meredith v. Time Insurance Co. 980 F.2d 352 (5th Cir. 1993), the issue was whether a sole proprietor without employees is a proper ERISA plaintiff. Although the court in Meredith held that such an individual was not a proper ERISA plaintiff, the court seems to imply that had there been employees also covered under the benefit plan, then the result might have been different.

> "Under the controlling definition, Meredith is not an employer because she has no employees and plans without employees are, by definition, not regulated by ERISA." Meredith supra. at 358.

Petitioner also relies extensively on District Court opinions which do not necessarily demonstrate a split in the judicial circuit. The impact of the District Court opinions are not left to the Appeal Courts of the circuits.

IV.

CONCLUSION

Petitioner and assistants purchased a policy of insurance through his jointly owned business which provided similar insurance benefits to employees of the business. The policy of insurance in this case specifically excluded bypass surgery. Both the District Court and the Ninth Circuit Court of Appeals have determined that the policy was clear and unambiguous. The petitioner now requests to continue to prosecute this action claiming benefits for expenses in

connection with his bypass surgery. Under any forum or jurisdiction, the case involves a clear, unambiguous insurance policy, which both the District Court and the Ninth Circuit Court of Appeals have determined does not confer any claim for benefits on the petitioner. Therefore the petitioner's request for Certiorari is moot and should be denied.

DATED: September 28, 1995.

Respectfully submitted

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